Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. ~~1349~~ 70-83

FRANK WELLS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF RIVERSIDE COUNTY, STATE OF CALIFORNIA

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The petitioner FRANK WELLS respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Department of the Superior Court for the County of Riverside on October 15, 1970.

OPINION BELOW

Under California Law, the appellate court does not have to render a written opinion. In the instant matter, no written opinion was made; however a copy of the decision of appeal is attached hereto.

JURISDICTION

That on January 12, 1971 petitioner filed an application for extension of time to file petition for writ of certiorari. On January 14, 1971 this court granted an order extending time to file the petition for writ of certiorari until February 13, 1971.

Petitioner seeks to review the judgment of the Superior Court of the State of California, Appellate Department entered on October 15, 1970 and becoming final on October 20, 1970, affirming the conviction of the petitioner in the Municipal Court, Riverside Judicial District.

Jurisdiction is sought under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his Constitutional right to a speedy trial as provided for by the Sixth Amendment because the State of California did not file the misdemeanor complaint until almost one year had pssed from the alleged violations and because the complaint was not served until almost two years after the alleged violations.

2. Whether petitioner's sentence was unconstitutional as cruel and unusual punishment.

3. Whether petitioner was deprived of due process by the lower court's order of restitution without conducting any hearing to determine that petitioner in fact should make restitution.

STATEMENT OF THE CASE

On or about April 22, 1966 a misdemeanor complaint was filed in the Municipal Court of Riverside Judicial District, Riverside County, State of California alleging that the petitioner violated Section 2110 of the California Unemployment Insurance Code by wilfully and unlawfully failing to pay trust monies withheld from employees contributions as provided by Section 986 of said code. The complaint alleged two counts. The first count alleged that the petitioner failed to pay $20.92 of insurance contributions withheld from employees wages for the first quarter of 1965. The second count alleged a failure to pay $17.42 of insurance contributions for the second quarter of 1965. After two trials, the petitioner was convicted of both counts and that in December of 1968 the Municipal Court imposed judgment upon petitioner granting him three years probation on the condition that he pay a fine of $625.00, that he serve a 30-day jail sentence and that he make restitution of $5,147.30 before he could be released from custody.

Petitioner filed an immediate notice of appeal to the Appellate Division of the Superior Court of Riverside. On or about October 15, 1970, the appellate division of the Superior Court affirmed the lower court's decision. Since the Appellate Division of the Superior Court did not render a written opinion, the case was not transferred for review by the Court of Appeals of the State of California; therefore, petitioner exhausted his remedy of review in state courts.

The alleged violation of law occurred during the first quarter of 1965 which would have been for January to March of 1965 and the second quarter of 1965 which would have been for March to the end of June. The complaint was not filed until April 22, 1966 and the defendant was not arrested until March 30, 1967 almost two years from the date of the offense.

Under California law the maximum punishment for a misdemeanor of this nature is one year in county jail with a $1,000 fine. The court ordered the defendant to make restitution of $5,000 without conducting a hearing to determine whether or not restitution was in order. The restitution ordered was far in excess of the $38.34 which petitioner allegedly and wilfully withheld.

REASONS FOR GRANTING THE WRIT

1. THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL AS PROVIDED FOR BY THE SIXTH AMENDMENT BECAUSE THE STATE OF CALIFORNIA DID NOT FILE THE MISDEMEANOR COMPLAINT UNTIL ALMOST ONE YEAR HAD PASSED FROM THE ALLEGED VIOLATIONS AND BECAUSE THE COMPLAINT WAS NOT SERVED UNTIL ALMOST TWO YEARS AFTER THE ALLEGED VIOLATIONS.

This Court in the case of Klopfer v. North Carolina, 386 U.S. 213, (1966), stated as follows:

> "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right'; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166). By the late thirteenth century, justices, armed with commissions of gaol delivery and/or oyer and terminer we visiting the countryside three times a year. These justices, Sir Edward Coke wrote in Part II of his Institutes, 'have not suffered the prisoner to be

long detained, but at their next coming have given the prisoner full and speedy justice, ... without deta ining him long in prison.' To Coke, prolonged detention without trial would have been contrary to the law and custom of England; but he also believed that the delay in trial, by itself, would be an improper denial of justice. In his explication of Chapter 29 of the Magna Carta, he wrote that the words 'We will sell to no man, we will not deny or defer to any man either justice or right' had the following effect:

> 'And therefore, every subject of this realme, for injury done to him in bonis, terris, vel persona, by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.' "

Furthermore, this court in the case of Smith v. Hooey, 393 U.S. 377, (1968), quoted the Klopfer case, supra, and with reference to a speedy trial stated as follows:

> "Suffice it to remember that this constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system; '[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself.
>
> Finally, it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend

himself' are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective', a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time."

Almost two years passed from the alleged violations until the petitioner became aware of the alleged violations by being arrested. The record and briefs below reflect that the complaint had been filed for almost one year before it was served on petitioner. During this same year, petitioner's whereabouts was known to authorities yet he was not arrested. Petitioner during this period of time maintained the same business and residential addresses. Petitioner was served civil process by Deputy Sheriffs during this period of time so it can be argued that petitioner's whereabouts was known to authorities.

The unreasonable delay has prejudiced petitioner's right to present a complete defense at the time of trial. The record below reflects in petitioner's brief that as a result of the delay petitioner was unable to locate records and witnesses for the trial. See attached appendix 2 which is a copy of an exhibit presented to the appellate division of the Riverside Superior Court.

Attached as Appendix 3 is a copy of a declaration filed in the lower court. This declarant was the employer whose unemployment insurance contributions were allegedly withheld by petitioner. However, the declaration shows records were not available at the time of trial and if they had been, then petitioner did not have to contribute unemployment benefits because declarant was not paid until the third quarter of 1965.

- - -

2. THE PETITIONER'S SENTENCE WAS UNCONSTITUTIONAL AS CRUEL AND UNUSUAL PUNISHMENT.

Petitioner allegedly failed to pay $38.00 of unemployment insurance benefits. This was petitioner's only alleged "criminal activity". He had never been in trouble with authorities before and was a responsible and respected business man. For violating this law, petitioner was given three years probation on the condition that he pay a fine of $625.00, be imprisoned for 30 days, and make restitution of $5,147.30 before his release from custody.

Petitioner argues that this is cruel and unusual punishment on its face and must be reversed.

3. THE PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE LOWER COURT'S ORDER OF RESTITUTION WITHOUT CONDUCTING ANY HEARING TO DETERMINE THAT PETITIONER IN FACT SHOULD MAKE RESTITUTION.

Petitioner allegedly withheld $38.00 of employer contributions. Yet without a hearing on the merits at the time of sentencing he was ordered to make restitution in the amount of $5,147.30. Restitution should only have been in the amount of $38.00. If restitution was in order for other allegedly wilful failure to pay employee contributions then at least additional complaints or other counts should have been filed. No other complaints or counts have ever been filed and the ordered restitution was arbitrary and without the benefit of any hearing and therefore must be stricken from the sentence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of the Appellate Department.

Respectfully submitted,

Frank G. Prantil

FRANK G. PRANTIL
Attorney for Petitioner.

RIVERSIDE COUNTY

OCT 15 1970

DONALD D. SULLIVAN, Clerk

By _____ Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

(APPELLATE DEPARTMENT)

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff & Respondent

vs

FRANK WELLS
Defendant &Appellant

Case No. A-271

DECISION ON APPEAL

The judgment of the Municipal Court, Riverside Judicial District, heretofore entered in this matter, is hereby affirmed.

--------- awarded costs on appeal.

Dated: October 15, 1970

A. Scott Dales

Warren E. Daugherty

Judges of the Appellate Department

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1349

FRANK WELLS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Response to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of Riverside County, State of California.

I.

The petitioner was not deprived of his constitutional right to a speedy trial as provided by the Sixth Amendment. Even a cursory reading of the Settlement Statement on Appeal, particularly at pages 3 through 5 thereof, indicates that a good part of the time which elapsed from the time of the commission of the offense to the time of trial was at petitioner's request. Petitioner requested extensions of time, most of which were granted, and now has the timerity to complain that he has been prejudiced by the lapse of time.

Furthermore, as a result of a special hearing in the Superior Court, the Appellate Court Commissioner found that there were many unsuccessful attempts to effect service of the warrant and that it was, once again,

the petitioner's request that the warrant not be served. (See "Findings on Reference" attached hereto.)

Section 801 of the California Penal Code states that a complaint on a misdemeanor is to be filed within one year after its commission. This complaint was filed on April 22, 1966. The violations alleged in the complaint dealt with violations allegedly committed on May 4, 1965 and August 3, 1965. Thus the complaint itself was filed well within the statutory limitations.

Section 1382, subdivision (3) of the California Penal Code establishes the rule in California that the time for trial begins measurement from the time of the arraignment, "regardless of when the complaint is filed."

II.

The Petitioner's sentence was not unconstitutional and was not cruel and unusual punishment.

Page 13 of the docket of the sentencing court shows that on March 13, 1969 the court, in fixing sentence, ordered the petitioner to serve 30 days in jail, pay a fine of $625 and make restitution in the amount of $5,147.30 to the Department of Employment on or before August 1, 1969, *not* "before his release from custody" as alleged by petitioner's counsel.

It is clear from the Settled Statement on Appeal that this conviction was not the first time that petitioner had made deductions from the wages of his employees and then kept such deductions himself or within the corporations.

III.

Petitioner not deprived of Hearing *re* Restitution. That this amount was owed to the Department of Employment had already been substantiated by re-

turns filed with that Agency by Petitioner or his corporations and all the court was saying was that Petitioner should pay the admitted sums. The sums were the wages of his employees.

Surely in fixing sentence the Court is not limited in its power to restore to the public funds wrongly withheld by an employer. It is axiomatic that the sentencing court may look beyond the four corners of the complaint in fixing probation and the terms thereof.

Obviously if Petitioner could not abide the conditions of probation he was at liberty to so declare to the sentencing court which could then deny probation and impose only a jail term and/or monetary fine.

BYRON C. MORTON,
District Attorney,
County of Riverside,
By SAMUEL D. KAHN,
Deputy District Attorney,
Attorneys for Respondent.

EXHIBIT 1.

Settled Statement on Appeal.

In the Municipal Court of Riverside Judicial District, County of Riverside, State of California.

The People of the State of California, Plaintiff, vs. Frank Wells, Defendant. No. 26806.

Defendant was charged in a complaint filed April 22, 1966, with a two-count violation of Section 2110 of the California Unemployment Insurance Code, making it misdemeanor to wilfully and unlawfully fail to pay trust monies withheld from worker's contributions as provided by Section 986 of said Code. Count I involved a failure to pay $20.92 in state disability insurance contributions withheld from employees' wages for the first calendar quarter of 1965; Count II involved a failure to pay $17.42 in state disability insurance contributions withheld from employees' wages for the second quarter of 1965. The taxes were due from a corporation known as PERMCO, INC.

Plaintiff called as its first witness ROY SIMPSON, Operations Officer of UNITED CALIFORNIA BANK, Main Street, Riverside Branch. He testified that during the times mentioned in the complaint herein that PERMCO, INC., maintained a commercial account at that bank; that he was familiar with the account; and that that account is now closed. He stated that the authorized signature forms for that account indicated that FRANK WELLS was the only person authorized to sign checks on behalf of the corporation. On cross-examination MR. SIMPSON also testified that the DEPARTMENT OF EMPLOYMENT has the power

to serve a hold order on the account of any corporation which is delinquent in paying withheld deductions for state disability insurance. He said that such a hold order was served with regard to the PERMCO account, but that the account was subject to a $122,000.00 loan then payable by PERMCO, INC., to the bank. He testified that because of the claim of the bank that the DEPARTMENT OF EMPLOYMENT was unable to have its claims satisfied from the PERMCO account.

Plaintiff's next witness was PAUL PADDOCK. MR. PADDOCK testified that he was employed by PERMCO, INC., for at least part of both the first and second quarters of 1965. MR. PADDOCK was unable to produce withholding statements for paychecks from PERMCO for those periods despite the fact that a subpoena duces tecum had been issued for their production. MR. PADDOCK stated that to the best of his recollection, deductions for state disability insurance were taken from his wages, but he could not say definitely that they were withheld. MR. PADDOCK stated that FRANK WELLS was the person who did the hiring and firing and managed the normal business affairs for PERMCO, INC. MR. PADDOCK was shown a check made payable to petty cash, on cross-examination, which he had endorsed, but he could not remember what the check had been for, but he stated that he did not believe it had been for salary. This check was put into evidence by the defendant. He testified that he could not state for certain as to when he was paid in full for such employment, except that it was likely that he was not paid in full for the periods in question until August or September, 1965.

The third witness for the People was MARY C. RASCH. She testified that she was the bookkeeper for PERMCO, INC., for the first and second quarters of 1965, and that she was positive that deductions had been taken from employees' wages during those two quarters for state disability insurance. She was shown copies of form DE-3 (a DEPARTMENT OF EMPLOYMENT Employer's Tax and Deduction Return) which were accepted as People's IA and IB for identification. She testified that these two DE-3 forms were the PERMCO, INC., quarterly reports for the first and second quarters of 1965, respectively, and that they were filed with the DEPARTMENT OF EMPLOYMENT. That they indicated on their face that PERMCO had employees, including PAUL PADDOCK, during the first two quarters and that deductions for state disability insurance were taken from their wages. That the said deductions for employee contributions for the first quarter 1965 totaled $20.92, and for the second quarter 1965 totaled $17.42. She testified that she prepared the returns which indicated the deductions had been taken from employees' wages for disability insurance, and that MR. WELLS, the defendant, had signed them as President of PERMCO, INC. MRS. RASCH testified that some wages were paid late in 1965, but that she was certain that some wages were paid during the first and second quarters of 1965 and that deductions were taken from those wages for state disability insurance. On cross-examination, MRS. RASCH was shown some of the cancelled checks from the PERMCO account and was asked to point out wages checks. She apparently found only several, but she stated that the checks shown her were not all of the PERMCO, INC., checks for the period

in question. The checks shown her were not offered for identification nor as evidence for defendant. She testified that all wages due her for the first two quarters of 1965 were not paid to her during those quarters, but that some of the wages were paid at a much later date.

The last witness called by the People was ANTHONY ATAMIAN, Employment Tax Auditor for the CALIFORNIA DEPARTMENT OF EMPLOYMENT. MR. ATAMIAN testified that notices of amounts due for the first and second quarters of 1965 for state disability insurance contributions were sent to PERMCO, INC., as follows:

Billings for liability for the first quarter of 1965 for PERMCO, INC., were sent to the corporate business address of record of the State of California—P.O. Box 1376, Hemet, California, by the Sacramento Office of the DEPARTMENT OF EMPLOYMENT on May 27, 1965; that upon receiving copies of this billing notice in the Riverside Office on July 14, 1965, a collection letter was addressed to the corporation at the above address for an appearance in the Riverside Office. No appearance was made. On August 3, 1965, Defendant WELLS was in MR. ATAMIAN's office and personally stated that he would pay the amount due by PERMCO, INC., within ten days. This promise was in response to verbal demand by MR. ATAMIAN. Billings for liability for the second quarter of 1965 were sent to the above corporate business address by the Sacramento Office on September 1, 1965. Upon receipt of copies of this billing notice, the Riverside Office sent a collection letter to the same address. Defendant WELLS responded by calling MR. ATA-

MIAN on the telephone and personally requesting an extension of time for compliance to September 13, 1965. This extension was granted. No payment was received on or before the 13th. The next contact MR. ATAMIAN had with MR. WELLS or PERMCO, INC., was on March 14, 1967, when MR. WELLS came into MR. ATAMIAN's office to ask why a warrant of arrest was out for MR. WELLS. MR. WELLS was then advised of the total amount of contributions due and taxes due from PERMCO, INC. On March 23, 1967, Defendant WELLS again came into MR. ATAMIAN'S office and requested a complete breakdown of the liabilities of PERMCO, INC. He was given that breakdown by MR. ATAMIAN. On March 29, 1967, WELLS appeared again personally in MR. ATAMIAN'S office and wanted to know if the Department would drop the complaint if he paid the employees' share of the disability insurance tax. MR. WELLS was emphatically told by MR. ATAMIAN that the Department had no authority to withdraw a complaint once it was filed. On March 30, 1967, Defendant WELLS appeared once again in MR. ATAMIAN'S office and paid the employees' contributions and was arrested approximately three minutes after the payment was made.

Copies of the billing notices of liability were introduced as People's 2A and 2B.

The defendant, FRANK WELLS, took the stand in his own behalf. He testified that he was not certain whether employee deductions for state disability insurance for PERMCO, INC., had been taken for the quarters in question but he said they could have been taken. He testified that he was involved with several other corporations, either as an officer or as a rep-

resentative of PERMCO, INC., in loans made by PERMCO to the other corporations. MR. WELLS said that if deductions had been taken, he was not aware that they had not been paid to the DEPARTMENT OF EMPLOYMENT. He said that he never received the billings notices of liability mentioned by MR. ATAMIAN. MR. WELLS testified that he paid the deductions due for the third quarter of 1965 and had he known then that the deductions from the first and second quarters had not been paid at that time, he would have applied the moneys then paid to the liabilities of the first and second quarters. MR. WELLS testified that PERMCO was having financial difficulties; that PERMCO had loaned amounts to other corporations, and that this was one of the reasons for the lack of funds with which to pay the employees' contributions. Another reason was that creditors of PERMCO, INC., were seeking to be paid.

MR. WELLS testified he was not an employing unit, as defined by the Unemployment Insurance Code; that he had no personal or dba payrolls during the first and second quarters of 1965; that receipt of any notices demanding payment from PERMCO, INC., for taxes claimed would be and was handled by clerical assistance in the office and not by defendant personally. Defendant testified that during the period in question, PERMCO, INC., was in dire financial straits because large loans made to other companies were not only past due, but potentially worthless; that defendant was required to work long hours attempting to: (1) clear up the problems of the companies which owed PERMCO, INC., money in the hope this would make collection possible; (2) proceed with lawsuits to attempt to make collections and discover hid-

den assets; (3) defend PERMCO, INC., from creditors who demanded continuing information on progress in making payment to them, and defend PERMCO, INC., from any lawsuits filed by its creditors; and that all this and related demands on defendant's time and attention made it impossible to keep up with many detail managerial affairs of the company.

WELLS further testified the PERMCO, INC., accounts were not specially discussed when he called on ATAMIAN August 3rd, since the purpose of the call which was arranged by WELLS was to discuss the situation regarding reports and sums due from the several firms owing money to PERMCO, INC., and also to the CALIFORNIA CAPITAL CORPORATION, an affiliated company. Defendant WELLS knew the financial situation of these firms, since as manager of PERMCO, INC., and CALIFORNIA CAPITAL CORPORATION who were creditors he was spending much time seeking solutions to the several companies involved. This information was of interest and value to ATAMIAN.

Defendant also testified no demand was ever made upon him personally for payment of the $39.34 in disability insurance contributions; that he at all times engaged in business in the Hemet and Riverside areas; that his business address was and is and was during the entire period during 1965 and as of today P.O. Box 1376, Hemet, California; and that his office during the entire year 1965 and up to and including January 1968 was Hangar #3 at Ryan Field, Hemet, California, and that during all of 1965 and up to the time of trial his residence address was in Hemet, California, and was the same address that he was constantly available to the agents of the State had they desired to con-

tact him; that of the $133.73 paid October 30, 1965, $99.74 was not trust fund monies; that if he had been aware the $38.34 was not paid he would have designated $38.34 of the $99.74 be applied as trust funds and that he would not wilfully refuse to pay trust fund money and at the same time pay larger sums which were not trust funds, and that when he learned of the claim he immediately sought records to establish the validity, stating it would be paid if owed; that within a short period thereafter on March 29, 1967, he called MR. ATAMIAN and stated he would be in that day to establish the exact amount due according to their records, including interest and would purchase a money order to clear up the matter the following day; and that the claim would have been paid long ago if he would have been notified at any time during the sixteen and one-half months following the October 30, 1965, payment of the 1965 third quarter sum of $133.73. Defendant WELLS testified he did in fact come into MR. ATAMIAN'S office to hand over the money order already purchased, that he did in fact hand over the $38.34 and it was accepted and he was given a receipt of payment; and that immediately after making the payment he was arrested on the complaint under which he was subsequently convicted herein. MR. WELLS further testified he visited MR. ATAMIAN at his office the day after he was arrested and at this time he had a copy of the complaint which he had been given at the preliminary hearing, and that he asked MR. ATAMIAN to give the wording of Code Section 2110, and after receiving this and writing it down he remarked to MR. ATAMIN "that was a very malicious thing you did keeping me waiting while you called the Riverside police to arrest me, when

you knew I had come in to pay your claim with a money order." Defendant also testified he did not often make out DEPARTMENT OF EMPLOYMENT or other tax returns and on some occasions did not even sign the returns personally.

Defendant testified that while the first and second quarter returns showed payrolls, the second quarter represented accruals of wages and wages accrued were not paid during the second quarter due to the financial problems confronting the PERMCO, INC., company.

On cross-examination, MR. WELLS was asked if he had been convicted of a violation of this same section (Section 2110 CUIC) in Hemet Justice Court on February 4, 1966, regarding another corporation. MR. WELLS replied that he had been so convicted. There was an objection to this question after the defendant had answered. On redirect examination, MR. WELLS was allowed to explain that he was merely a "creditor's representative" of the particular corporation at the time of his conviction. There was a recess to the Judge's chambers for arguing the point. Following a discussion there it was decided by the defendant that it would be impossible to erase the matter from the jurors' minds and he would want to attempt to explain to the jury how the complaint and conviction had occurred. The objection was withdrawn. In general defendant stated the conviction was not really a prior conviction, but was for a circumstance occurring during the same period of time as the subject case and that he was acting as a creditor's representative of an insolvent corporation at the time. Also on cross-examination, MR. WELLS testified that several of the corporations which he had mentioned on direct testimony as being objects of his time and efforts or recipients of loans

from PERMCO, INC., had at one time been located in the same office as PERMCO, INC.

At the conclusion of all the testimony, the People submitted an instruction, which was given by the court, inter alia, on the issue of a prior conviction introduced to show knowledge which might have been useful in the commission of the crime for which the defendant was on trial (CAL JIC. 33). An instruction was requested and given on the meaning of "wilfullness" as used in Section 2110 of the California Unemployment Insurance Code, based on *People vs. Oester*, 154 CAL. APP. 2d Supp. 888 at 892 (1957). The jury was also instructed in the language of Section 2110 of the California Unemployment Insurance Code as it existed at the time of the alleged offense, with the insertion of the word "wilfully" before the phrase "financially unable to pay," as dictated by the *Oester* case.

At the conclusion of the trial, the defendant MR. FRANK WELLS, was found guilty on both counts of violation of Section 2110 CUIC.

The following matter is included in this Statement as a specification of the grounds on which defendant intends to rely pursuant to Rule 184, and as set forth in his proposed Statement on Appeal:

After the trial and before sentencing, information relating to evidence in this case, was discovered which established MR. PADDOCK was not paid any wages during the second quarter of 1965. MR. PADDOCK provided an affidavit establishing this for the court which was filed with the court by the defendant as an exhibit together with an affidavit by the defendant, including (a) a declaration of improper statements made by the assistant district attorney to the witness MR. PADDOCK in the presence of the defendant;

(b) further statement by the assistant district attorney in the chambers of JUDGE SCHULTE; (c) impeachment information regarding MR. ATAMIAN'S testimony; (d) declaration regarding new information and the testimony of MRS. RASCH, and (e) information discovered after the trial, which supported the trial testimony of the defendant.

Exhibits A through D included copies of returns for the fourth quarter of 1965 and the first quarter of 1966 making three returns with payments totaling $380.10 of company contributions divided into $99.74 for the third quarter of 1965; $148.69 for the fourth quarter of 1965 and $131.67 for the first quarter of 1966, which established a nine-month period during which, if it were known the trust funds of $38.34 were unpaid they could have been paid by an allocation of funds from the three company contribution amounts or by independent disbursement of funds.

The preceding information included in the affidavit and Exhibit A through D, inclusive, was filed with the court before sentencing, a motion for a new trial was made, said motion was denied and the defendant sentenced.

Defendant was charged, tried, the case was appealed, a motion for a new trial was granted and the appeal abandoned, a written motion to dismiss was heard and denied; a new jury trial was set with defendant represented by DALE MILLER, attorney. The complaint, when sent down to Department did not state a cause of action nor did it include the charge of "knowingly" in addition to "wilfully and unlawfully," etc.

Defendant was charged as personally being an employing unit, under complaint filed April 22, 1966,

with a two-count violation of Section 2110 of the California Unemployment Insurance Code, making it a misdemeanor to wilfully, unlawfully, and knowingly fail to pay trust monies withheld from worker's wages as provided by Section 986 of said code. The State's case, when presented at the trial, was that the taxes involved were due from a corporation known as PERMCO, INC., though this was not charged in the complaint. Count I as presented by the State was that PERMCO, INC., wilfully and unlawfully failed to pay $20.92 in trust monies withheld from workers' contributions for the first calendar quarter of 1965, though this was not charged in the complaint; Count II as presented by the State was that PERMCO, INC., wilfully and unlawfully failed to pay $17.42 in State trust monies withheld from workers' contributions for the second quarter of 1965, though this was not charged in the complaint.

The written motion to dismiss which was made November 27, 1968, at 3:00 p.m. by ATTORNEY DALE MILLER, in Department 3, was denied without opinion or statement of reason. Prior to the start of the trial, defendant's attorney, DALE MILLER, made numerous verbal motions including:

(a) Defendant was not charged as an officer of PERMCO, INC., a corporation, but as an individual employing unit and the charge should be dismissed.

(b) That the charge of the complaint stating that defendant "failed to pay trust funds withheld from workers' contributions" did not make sense and the complaint was invalid.

(c) That the complaint did not properly represent Section 2110 of the California Unemployment Insurance Code and was invalid.

(d) That the warrant was not served timely; and the period of time from claimed offense to the date of service of the warrant was almost two years which voided the charge and the complaint should be dismissed.

(e) Count I should be dismissed as the Statute of Limitations had passed and Count II because no wages were paid during the second quarter.

All motions were denied.

DATED: March 31, 1970.

The foregoing is settled and certified as the Statement on Appeal in the within case.

GERALD F. SCHULTE
Judge of the Municipal Court

EXHIBIT 2.

Findings on Reference.

In the Superior Court of the State of California, in and for the County of Riverside. (Sitting as an Appellate Department).

The People of the State of California, Plaintiff and Respondent, vs. Frank Wells, Defendant and Appellant. No. A-271.

Pursuant to minute order of May 11, 1970, referring the within matter to the Court Commissioner and directing that he "take proof and make and report his findings thereon as to the circumstances attending the delay in the service of the warrant upon defendant, and whether there was any justification or excuse for such delay," a hearing was held on May 22, 1970, the People appearing by Byron C. Morton, District Attorney of Riverside County, by Terry Boren, Deputy District Attorney, and the defendant appearing *in pro. per.* and with associate counsel, James L. Kellam. The People called as witnesses Sheriff's Sergeant Watson Gilmore, and Deputy Sheriff Tony A. Gonzales, both of the Hemet substation, and Anthony Atamian, field audit supervisor of the Department of Employment. The defendant testified in his own behalf. Wherefore, upon such testimony, and upon the docket entries in Municipal Court of the Riverside Judicial District case No. 26806, findings upon the referred issue are made as follows:

1. On April 22, 1966, a criminal complaint was filed against the defendant and a warrant was issued for his arrest.

2. The warrant was sent to the sheriff's substation in Hemet, in which community defendant maintained a residence and business address.

3. The Sheriff made several unsuccessful attempts to serve defendant in Hemet. No witness had a specific recollection of the particular dates and places involved in the attempts at service. Written records of such facts are kept by the Sheriff for ninety days after service is effected.

4. Defendant made no effort to evade service. He was, however, frequently absent from Hemet on business matters.

5. Early in March, 1967, defendant first learned that the warrant was outstanding. At the defendant's request, the Sheriff withheld further attempts at service, to allow defendant time to "straighten out" the problem with the Department of Employment.

6. On March 30, 1967, while at the Riverside office of the Department of Employment, defendant was served with the warrant by a Riverside police officer.

DATED: June 4, 1970.

/s/ Alexander B. Yakutis,
Alexander B. Yakutis,
Court Commissioner.

#26806

Page 12 — Continued —

From Weeks: —

FEB 07 1969 Case Continued to 2-17-69 at 8:15 for RIS Per order of Judge Schulte. cc

FEB 07 1969 Probation Officer Report Filed
REFERRAL ISSUED

~~FEB 10 1969~~

FEB 17 1969 JUDGE GERALD F. SCHULTE CLERK: Frank Daniel Dan
DEFT ——— IN COURT WITH COUNSEL Dale Miller
ON MOTION OF DEFT'S COUNSEL, CASE CONTINUED FOR
TO 1:30. Feb 27-1969
Dft appeared Counsel motions for Case to be continued Dft & Counsel so time.

FEB 27 1969 JUDGE GERALD F. SCHULTE CLERK: Frank Daniel
DEFT IN COURT WITH COUNSEL D. Miller
ON MOTION OF DEFT'S COUNSEL, CASE CONTINUED FOR Sentence
TO March 13, 1969 1:30 PM

MAR 13 1969 PROBATION OFFICER'S Sup Report FILED

MAR 13 1969

JUDGE GERALD F. SCHULTE CLERK: Frank Daniel Dan
DEFT IN COURT WITHOUT COUNSEL Dale Miller
Deft Miller Counsel for Dft Smith P/O
motion for new trial and motion
Motion for new trial denied

DEFT'S COUNSEL STATED THERE WAS NO LEGAL CAUSE AGAINST PRONOUNCING JUDGMENT.
Court read Supp P/O Report & read
Deft sworn by Paul Paddock 3-13-69
Frank Weeks 3/12/69 & read by the Court

(1) 3-13-69 JGMT

ORDERED THAT DEFT BE GRANTED 3 YEARS PROBATION ON FOLLOWING TERMS:
THAT DEFT
NOT VIOLATE ANY LAWS;
BE FINED IN C. P.A. $625.00, ALL BUT $ 5 SUSPENDED (AND BE COMMITTED TO SHERIFF OF RIV. CO. 1 DAY FOR EACH $10 NOT PAID, CONSECUTIVELY.)
(BY PAYING ~~NOW AND $ ON OF EVERY MONTH BEGINNING~~
BE COMMITTED TO SHERIFF OF RIV. CO. FOR 30 ~~MONTHS~~, beg
ALL BUT ~~None~~ DAYS SUSPENDED, CONSECUTIVELY. April 1, 1969 at 9
Stay 7 4 Jail
Mail restitution
Payment on or before Custody in
your favor to Completion of Custody

MUN. CT. CRIM. 84 B

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cont'd from Page #1 Page #13

WELLS, Frank (William) 26806
2110 CUIC 2 counts

4. That he pay restitution in the amount of $5,147.30 directly to the Dept of Unx Employment ~~doe~~ monies owed to said agency by companies of which he was a responsible officer, said restitution to be paid in full on or before August 1, 1969 and with proof of payment to be furnished to the Clerk of the Court by said date.
5. That he comply with all rules and regulations of the Department of Employment in his future dealing with said agency

Commitment made

~~Bail exonerated.~~

CARD NO. 1135 MADE

(U.S. Fac bond on 2nd [illegible] of $1650.00)

3-21 Notice of appeal filed (2)

3-27 D.A. notified (3)

APR - 2 1969 Judge Gerald J. Schutzle
DEFT Richard, Clerk Ucalegon J. Gr. Jailed topper
~~(FAILURE TO PAY FINE)~~ Jail Ucalegon
(FAILURE TO REPORT FOR PART TIME JAIL SENTENCE) 10 ~~xx~~ 4-1-69

BENCH WARRANT ISSUED: 4-3-69
BAIL SET: Held w/o Bail
PROBATION REVOKED

WARRANT ISSUED

1969

4-8-69 (4) Order Extending time for Defendant to file profosed statement of facts filed.

4-8-69 Declaration of Frank Wells filed.

4-8-69 Declaration in Support of motion to Extend time to file a proposed statement of facts filed.

4-18-69 (5) Settled statement on appeal filed.
Declaration of Frank Wells filed.
Black Richard & Oley granted a Jail Ucalegon

5-2-69 Hearing on Settlement of Statement on Appeal set for 5-15-69 at 1:30 in Dept II (6)
D.A. & Defendant notified

MAY 13 1969 Plaintiffs Proposed Settled Statement on appeal received

MUN. CT. CRIM. 84 B

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Continued from Page #13 Page #14

WELLS, FRANK (WILLIAM) Case No. 26806
2110 CUIC 2 counts

MAY 15 1969

JUDGE GERALD F. SCHULTE CLERK: Linke Bacon Deputy
DEFT IN COURT WITHOUT COUNSEL

Def Mode Motion & Read Hearing
Settlement Statement on Appeal Certd
Court Grants Motion 15 Days May 22 1969
Copy of "Settlement Statement on Appeal
Forwarded to Dept
Def. filed Plaintiff's Proposed
Settled Statement on Appeal

BEST AVAILABLE COPY

EXHIBIT 4.

Order Extending Time for Defendant to File Proposed Statement of Facts.

Superior Court of the State of California, for the County of Riverside.

The People of the State of California, Plaintiff vs. Frank Wells, Defendant. No. 26806.

Upon reading the affidavits and declarations of Dale C. Miller and Frank Wells and good cause appearing pursuant to California Court Rules 138 and 137

It is HEREBY ORDERED ADJUDGED AND DECREED that defendant have 10 days from the date of this order in which to file his proposed statement of facts.

Dated: April 8, 1969

/s/ John G. Gabbert
Judge of the Superior Court

Declaration in Support of Motion to Extend Time to File a Proposed Statement of Facts.

Superior Court of the State of California, for the County of Riverside.

The People of the State of California, Plaintiff vs. Frank Wells, Defendant. No. 26806.

Filed: April 8, 1969.

DALE C. MILLER, being first duly sworn deposes and states:

That I am attorney of record for Frank Wells.

That when I first became engaged by Frank Wells he had an appeal pending.

That said appeal was dismissed and a motion for a new trial was granted.

That I represented Frank Wells at the trial and subsequently thereto.

That I felt that Frank Wells had good grounds for appeal in that he did not actually pay the employees until a much later date than the calendar reported, so that he could not have withheld trust funds during the period reported since he did not actually pay the employees who were reported to have been paid.

That I also felt that he had good ground for appeal in that the warrant of arrest was not served on him for a period of more than eleven months after its issuance and almost two years after the alleged offenses took place.

That due to difficulties with Mr. Well's I told him that I no longer wanted to represent him, but that I would file a Notice of Appeal, which was filed timely on or about March 21, 1969.

That I told Mr. Wells that I was not aware of the time in which to file the proposed statement of facts, but that I would let him know.

That I have been busily engaged in trial in department VII from March 24, 1969 through March 27, 1969. That I had four appearances in the week before including, one in Etiwanda, one in Pomona and two in San Bernardino and two law and motions in Riverside.

That due to mistake, inadvertence and neglect on my part the proposed statement of fact was not timely filed.

That I requested Judge Schulte of the Riverside Municipal Court for an extension of time, which was denied.

Whereby your appellant respectfully requests an extension of time of ten days from todays date.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed in the City of Riverside, County of Riverside, State of California.

DATED: April 2, 1969.

/s/ DALE C. MILLER
Dale C. Miller
Attorney for Defendant

Declaration of Frank Wells.

Superior Court of the State of California, for the County of Riverside.

The People of the State of California, Plaintiff vs. Frank Wells, Defendant. No. 26806.

Filed: April 8, 1969.

I, the undersigned, say: On March 13, 1969 prior to 1:30 p.m. I was in the office of Dale Miller, attorney, where I signed a "NOTICE OF APPEAL" which Mr. Miller prepared for possible use at the hearing, wherein Judge Schulte rendered his sentencing decision and granted a stay of execution until 4:00 p.m. on April 1, 1969. Mr. Miller did not file the notice of appeal at this time. After the sentencing I asked Mr. Miller how much time was available to file the "NOTICE OF APPEAL" and he said 10 days. I asked how soon after that remained to file a "PROPOSED STATEMENT OF FACTS" and he stated he did not know. He had other clients waiting at his office so I did not get an answer to my question. On March 19, I phoned his office and he was out so I asked his secretary to remind him to be certain to file the "NOTICE OF APPEAL" in time, I worried about it, so I wrote to him on that same day stating

"After the hearing last Thursday, you told me we had 10 days to file an appeal; you were not certain how long after that before the Statement of Facts had to be submitted. I want to be certain the appeal I signed is filed within the limit, whatever it is."

A copy of this notice is attached as Exhibit "A". On Friday March 21 I phone his office again and his secretary said it had not been filed but Mr. Miller was expected back before 5:00 p.m. and when I reminded

her the 10th day occurred on Saturday, and Monday might be too late, she assured me if Mr. Miller did not return by 5:00 p.m. she would take it over and file it herself. On Monday March 24, I phoned again and Mr. Miller was out. His secretary told me the "NOTICE OF APPEAL" was filed; she also told me Mr. Miller was very busy. On Monday March 31, I phoned Mr. Miller and reached him and mentioned the hearing was Tuesday April 1, at 4:00 P.M. He stated he had a trial at San Bernardino and might not be available. Today April 1, I went to his office about 3:40 P.M. and again asked how much time we had to prepare a "PROPOSED STATEMENT OF FACTS", and he took steps to look it up. There were delays, so I left to be certain to be in Dept. 2 courtroom at 4:00 P.M. My reason for again inquiring about the time allowed for this was with Mr. Miller so busy, and my having problems making acceptable financial arrangements with him, I wished him to ask Judge Schulte for added time for its preparation. It was my understanding with the "NOTICE OF APPEAL" filed and with $1,550.00 of bond money already posted, Mr. Miller would ask the Judge to reduce the bond already posted, or in the alternative continue it at that amount; and secondly establish what date the "STATEMENT OF FACTS" was to be filed.

At 4:00 P.M. Judge Schulte was out of his office and not available; at this time Mr. Miller advised me that the "PROPOSED STATEMENT OF FACTS" should have been filed within five days after the "NOTICE OF APPEAL" was filed. Mr. Miller wishes to be relieved of the case because of lack of payment, but has agreed to do his best to correct this situation, by (A). Requesting additional time to file a "PRO-

POSED STATEMENT OF FACTS", and "B" Requesting the existing bond be reduced or in the alternative continued at its present amount.

I further state I have always appeared as ordered in connection with this matter, and any other matter where my presence was required and would continue to do so with or without a bond. When I was first arrested on this charge I was asked for a bond of $550.00 which was remanded the following day and all my appearances were without bond until the appeal from the first trial. Further, I live in Riverside County and have for many years, I declare under penalty of perjury that the foregoing is true and correct. Executed April 1, 1969, at Hemet, California.

/s/ Frank Wells

EXHIBIT "A"

Date 3/19/69

To Dale Miller, Attorney
Suite 300 Law Building
3972 Main Street
Riverside, California 92501

Dear Dale: I tried to call you today, but you were in court so I left the message with your secretary. After the hearing last Thursday, you told me we had 10 days to file an appeal; you were not certain how long after that before the Statement of Facts had to be submitted. I want to be certain the appeal I signed is filed within the limit, whatever it is. Regarding your fees, and cooperation on an appeal I plan to be in and see you next week—towards the end of the week. Thanks for all you have done.

Best regards,
/s/ Frank Wells

Declaration of Frank Wells.

In the Municipal Court of Riverside, Judicial District, County of Riverside, State of California.

The People of the State of California, Plaintiff, vs. Frank Wells, Defendant. No. 26806.

I, the undersigned, say that the appeal bond posted in this case was posted by a California corporation which had an operating division named "REVERE MOBILE HOMES" and that the money used for this purpose was a collection from a mobile home sale in Beaumont, California and that I had no personal financial interest in that sale and collection. The money was posted for my benefit as bail and for no other purpose.

I understand this money has been liened by the Internal Revenue Service as a claim against me personally on a disputed tax matter. Regardless of the outcome of this dispute, there can be no recovery against this bond as I have no personal financial interest in this sum of money.

It is my understanding this money as a bond was deposited with the court as a deposit by Revere Mobile Homes.

I, the undersigned, say:

I am the defendant in this case. I have read the foregoing and the same is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury the foregoing is true and correct.

Executed on April 12, 1969 at Hemet, California.

/s/ Frank Wells
Frank Wells